

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

ELISHA EVANGELISTO,)	
)	
Petitioner,)	
)	
vs.)	DOAH Case No. 20-3820
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
_____)	

FINAL ORDER

On January 21, 2021, Administrative Law Judge Jodi-Ann V. Livingstone (hereafter “ALJ”) submitted her Recommended Order to the State Board of Administration (hereafter “SBA”) in this proceeding. A copy of the Recommended Order indicates that copies were served upon the *pro se* Petitioner, Elisha Evangelisto, and upon counsel for the Respondent. Both Petitioner and Respondent timely filed Proposed Recommended Orders. Neither party filed exceptions to the Recommended Order which were due February 5, 2021. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Chief of Defined Contribution Programs for final agency action.

STATEMENT OF THE ISSUE

The State Board of Administration adopts and incorporates in this Final Order the Statement of the Issue in the Recommended Order as if fully set forth herein.

PRELIMINARY STATEMENT

The State Board of Administration adopts and incorporates in this Final Order the Preliminary Statement in the Recommended Order as if fully set forth herein.

STANDARDS OF AGENCY REVIEW OF RECOMMENDED ORDERS

The findings of fact of an Administrative Law Judge (“ALJ”) cannot be rejected or modified by a reviewing agency in its final order “...unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings were not based upon competent substantial evidence....” See Section 120.57(1)(l), Florida Statutes. *Accord, Dunham v. Highlands Cty. School Brd*, 652 So.2d 894 (Fla 2nd DCA 1995); *Dietz v. Florida Unemployment Appeals Comm.*, 634 So.2d 272 (Fla. 4th DCA 1994); *Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122 (Fla. 1st DCA 1987). A seminal case defining the “competent substantial evidence” standard is *De Groot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957), in which the Florida Supreme Court defined it as “such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred” or such evidence as is “sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.”

An agency reviewing an ALJ’s recommended order may not reweigh evidence, resolve conflicts therein, or judge the credibility of witnesses, as those are evidentiary matters within the province of administrative law judges as the triers of the facts. *Belleau v. Dept of Environmental Protection*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Maynard v. Unemployment Appeals Comm.*, 609 So.2d 143, 145 (Fla. 4th DCA 1993). Thus, if the record discloses any competent substantial evidence supporting finding of fact in the Recommended Order, the Final Order will be bound by such factual finding.

Pursuant to Section 120.57(1)(l), Florida Statutes, however, a reviewing agency has the general authority to “reject or modify conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive

jurisdiction.” Florida courts have consistently applied the “substantive jurisdiction limitation” to prohibit an agency from reviewing conclusions of law that are based upon the ALJ’s application of legal concepts, such as collateral estoppel and hearsay, but not from reviewing conclusions of law containing the presiding officer’s interpretation of a statute or rule over which the Legislature has provided the agency with administrative authority. *See Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140, 1141-42 (Fla. 2d DCA 2001); *Barfield v. Dep’t of Health*, 805 So.2d 1008, 1011 (Fla. 1st DCA 2001). When rejecting or modifying any conclusion of law, the reviewing agency must state with particularity its reasons for the rejection or modification and further must make a finding that the substituted conclusion of law is as or more reasonable than that which was rejected or modified. Further, an agency’s interpretation of the statutes and rules it administers is entitled to great weight, even if it is not the sole possible interpretation, the most logical interpretation, or even the most desirable interpretation. *See, State Bd. of Optometry v. Fla. Soc’y of Ophthalmology*, 538 So.2d 878, 884 (Fla. 1st DCA 1998). An agency’s interpretation will be rejected only where it is proven such interpretation is clearly erroneous or amounts to an abuse of discretion. *Level 3 Communications v. C.V. Jacobs*, 841 So.2d 447, 450 (Fla. 2002); *Okeechobee Health Care v. Collins*, 726 So.2d 775 (Fla. 1st DCA 1998).

FINDINGS OF FACT

The Findings of Fact set forth in the ALJ’s Recommended Order hereby are adopted and are specifically incorporated by reference as if fully set forth herein.

CONCLUSIONS OF LAW

The Conclusions of Law set forth in the ALJ’s Recommended Order are adopted and are specifically incorporated by reference as if fully set forth herein.

ORDERED

The Petitioner, Elisha Evangelisto, may not utilize an expired estimated buy-in amount if she chooses to file a second election to transfer from the Investment Plan to the Pension Plan, even if she had been provided erroneous information as to the required buy-in amount. Section 121.4501(4)(f)2., Florida Statutes, requires any FRS member desiring to make a second election from the Investment Plan to the Pension Plan to pay, using Investment Plan monies and any other necessary monies, a sum representing the present value of the member's accumulated benefit obligation immediately following the time of movement to the Pension Plan. The SBA does not have statutory authority to allow Ms. Evangelisto to utilize her second election by paying anything other than the statutorily-required buy-in sum. Petitioner's request for relief hereby is denied.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the State Board of Administration in the Office of the General Counsel, State Board of Administration, 1801 Hermitage Boulevard, Suite 100, Tallahassee, Florida, 32308, and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within thirty (30) days from the date the Final Order is filed with the Clerk of the State Board of Administration.

DONE AND ORDERED this 30 day of March, 2021, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



Daniel Beard

Chief of Defined Contribution Programs
Office of Defined Contribution Programs
State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308
(850) 488-4406

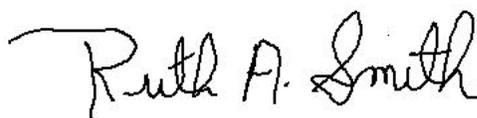
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



Tina Joanos,
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by electronic mail to Elisha Marie Evangelisto, *pro se*, both by email transmission to [REDACTED] and by UPS to: [REDACTED], and by and by email transmission to Deborah Minnis, Esq. (dminnis@ausley.com) and Ruth Vafek, Esq. (rvafek@ausley.com) (jmcvaney@ausley.com), Ausley & McMullen, P.A., 123 South Calhoun Street, P.O. Box 39 1, Tallahassee, Florida 32301, this 30 day of March, 2021.



Ruth A. Smith
Assistant General Counsel
State Board of Administration of Florida
1801 Hermitage Boulevard
Suite 100
Tallahassee, FL 32308

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

ELISHA EVANGELISTO,

Petitioner,

vs.

Case No. 20-3820

STATE BOARD OF ADMINISTRATION,

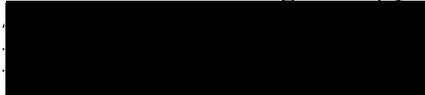
Respondent.

RECOMMENDED ORDER

The final hearing in this matter was conducted before Administrative Law Judge Jodi-Ann V. Livingstone of the Division of Administrative Hearings (DOAH) on December 1, 2020, by Zoom Conference.

APPEARANCES

For Petitioner: Elisha Marie Evangelisto, pro se



For Respondent: Deborah Stephens Minnis, Esquire
Ausley McMullen, P.A.
Post Office Box 391
Tallahassee, Florida 32302

STATEMENT OF THE ISSUES

The issues in this case are whether Petitioner was provided incorrect, inaccurate, and erroneous information, and, if so, if she may transfer to the Florida Retirement System (FRS) Pension Plan (Pension Plan) by paying a “buy-in” amount of \$2,418.55, consistent with the amount quoted to Petitioner in January 2020.

EXHIBIT A

PRELIMINARY STATEMENT

By letter dated July 22, 2020, the State Board of Administration (Respondent or SBA) advised Petitioner, Elisha Marie Evangelisto (Petitioner or Ms. Evangelisto), that it was denying her FRS Investment Plan Request for Intervention (Request). In her Request, Petitioner sought to transfer from the FRS Investment Plan to the Pension Plan retroactive to a date prior to her becoming “vested” under the Pension Plan.¹ Petitioner timely filed a Petition for Formal Administrative Proceeding (Petition). On August 21, 2020, SBA transmitted the Petition to DOAH for the assignment of an Administrative Law Judge to conduct a chapter 120, Florida Statutes, hearing.

The final hearing was held on December 1, 2020, with both parties present. Petitioner testified on her own behalf. Petitioner’s Exhibits 1 through 4 were admitted into evidence, without objection. Respondent called Ms. Allison Olson, Director of Policy, Risk Management, and Compliance in the Office of Defined Contribution Programs at SBA, as its witness. Respondent’s Exhibits R-1 through R-5 were admitted into evidence, without objection.

At the close of the hearing, the parties requested a period of twenty days following DOAH’s receipt of the hearing transcript to file post-hearing submittals. On December 15, 2020, the court reporter filed a one-volume hearing Transcript. On December 22, 2020, Ms. Evangelisto filed Petitioner’s Proposed Recommended Order. On January 4, 2021, Respondent filed SBA’s

¹ “Vested” or “vesting” means the guarantee that a member is eligible to receive a future retirement benefit upon completion of the required years of creditable service for the employee’s class of membership, even though the member may have terminated covered employment before reaching normal or early retirement date. § 121.021(45), Fla. Stat.

Any member initially enrolled in the FRS Pension Plan on or after July 1, 2011, becomes vested upon completion of eight years of creditable service. § 121.021(45)(b), Fla. Stat.

Proposed Recommended Order. Both submissions were duly considered in preparing this Recommended Order.

All references to statutes are to the 2020 versions of the Florida Statutes, unless otherwise noted.

FINDINGS OF FACT

1. Ms. Evangelisto has been continuously employed by an FRS-participating employer since August 2012.
2. As a new employee of an FRS-participating employer, Ms. Evangelisto had a choice to enroll in one of two FRS retirement plans: the Pension Plan or the Investment Plan.
3. The Pension Plan is administered by the Florida Division of Retirement (Division of Retirement), which is housed within the Department of Management Services. The Pension Plan is a defined benefit plan; the benefit is formula-based. The formula used for calculating a pension plan benefit is based on total years of creditable service at the time of retirement, membership class, and average final compensation. *See* § 121.091, Fla. Stat.
4. The Investment Plan is administered by SBA. The Investment Plan is a defined contribution plan; the benefit is based on gains and losses due to market performance.
5. On January 22, 2013, Ms. Evangelisto enrolled in the Investment Plan, with an effective date of February 1, 2013. This choice is considered Ms. Evangelisto's initial election. Ms. Evangelisto is still enrolled in the Investment Plan.
6. After making an initial election, an employee may make a "second election" if still employed with an FRS-participating employer, earning salary and service credit.

7. Ms. Evangelisto may utilize a second election to move into the Pension Plan, but must pay a “buy-in” amount to do so. This sum is derived from an actuarial calculation conducted by the Division of Retirement.

8. To effectuate a second election, Ms. Evangelisto must complete and submit a 2nd Election Retirement Plan Enrollment Form (2nd Election Form) to the Plan Choice Administrator. The 2nd Election Form may be obtained by calling the MyFRS Financial Guidance Line or through the MyFRS.com website.

9. When completed, the form may be submitted by facsimile, mail, or by electronic submission through the MyFRS.com website.

10. Respondent is required to provide FRS Investment Plan participants with educational services, including: disseminating educational materials; providing retirement planning education; explaining the Pension Plan and the Investment Plan; and offering financial planning guidance on matters such as investment diversification, investment risks, investment costs, and asset allocation. *See* § 121.4501(8)(b), Fla. Stat.

11. Respondent provides these educational services through Ernst & Young (EY), a contracted third-party administrator. EY financial planners provide information to FRS employees via the MyFRS Financial Guidance Line.

12. On multiple occasions over the years, going back to as early as July 2018, Ms. Evangelisto spoke to EY financial planners via the MyFRS Financial Guidance Line to request a calculation of her buy-in amount.²

13. In July 2018, Ms. Evangelisto contacted the MyFRS Guidance Line to request her buy-in amount. In August 2018, she received a comparison estimate.

14. The comparison estimate provided the estimated buy-in amount, the current value of her Investment Plan, and the amount of out-of-pocket funds

² Ms. Evangelisto testified that she made requests to determine her buy-in amount even prior to 2018.

Ms. Evangelisto would have to pay to buy into the Pension Plan. This out-of-pocket sum is the result of the difference between the buy-in amount determined by the Division of Retirement and her Investment Plan account balance.

15. The amounts contained in the comparison estimate are only valid for the calendar month in which they are issued.

16. From July 2018, through March 2019, there were numerous communications between Petitioner and EY Financial Planners by telephone conversation, email, and through voice messages. Ms. Evangelisto made requests for buy-in amounts and received updated comparison estimates in November 2018 and March 2019.

17. On January 13, 2020, Petitioner requested a calculation of her buy-in amount. On January 22, 2020, she received a comparison estimate which set forth an out-of-pocket cost of \$2,418.55 to transfer to the Pension Plan. The estimate indicated that it was valid until January 31, 2020.

18. On February 14, 2020, Petitioner requested another calculation of her buy-in amount. On March 12, 2020, she received a comparison estimate with an out-of-pocket cost of \$7,198.64. The estimate indicated that it was valid until March 31, 2020.

19. Ms. Evangelisto testified that she did not transfer to the Pension Plan, after being provided comparison estimates, because she did not have the funds to pay for the associated out-of-pocket cost.

20. On June 24, 2020, Petitioner called the MyFRS Guidance Line to request yet another comparison estimate. During this conversation, Petitioner inquired about potential changes to the buy-in amount associated with becoming "vested." The conversation was recorded and later transcribed by a court reporter:

Ms. Evangelisto: Does the cost to buy into the pension change significantly once you would be vested at the eight years?

EY financial planner: I actually don't know if it would or not.

Ms. Evangelisto: Okay.

EY financial planner: I can try to find out. I don't think it's necessarily based on vesting, but more the years of service.

Ms. Evangelisto: Okay.

21. During the June 24, 2020, call, the EY financial planner told Ms. Evangelisto that she could expect the comparison estimate in three weeks. Ms. Evangelisto agreed to July 16, 2020, for a follow-up call.

22. On July 9, 2020, Ms. Evangelisto received an email from EY, but the email did not contain the requested comparison report.

23. On July 15, 2020, Ms. Evangelisto called the MyFRS Guidance Line to follow up on her June 24 request and to ask about the July 9 email. The EY financial planner calculated the buy-in costs for her over the phone. He provided a verbal, estimated out-of-pocket cost of \$17,657.00 to buy into the Pension Plan. Surprised by this number, which was over \$10,000 higher than the out-of-pocket estimate provided in March 2020, Ms. Evangelisto asked why the cost increased. This telephone call was also recorded and later transcribed by a court reporter. Relevant parts of the conversation are as follows:

Ms. Evangelisto: Does it normally jump up heftily at eight years of service --

EY financial planner: No. No.

Ms. Evangelisto: -- or like in a yearly increment?

EY financial planner: No.

Ms. Evangelisto: It doesn't?

EY financial planner: It -- okay, you have been watching in and monitoring it very closely, so you had in December, January, March, and now we are a July figure. If all of those other figures were consistent, while the increase due to the change in the underlying interest rate might have a negative impact, it shouldn't be so much that it's going to bump up the cost by another \$10,000.

24. The EY financial planner promised to look into the numbers to ensure they were not miscalculated.

25. On the same day, the EY financial planner called Ms. Evangelisto back and left a voicemail. He stated that the out-of-pocket cost he provided on the earlier phone call was correct and that the number had substantially increased because Ms. Evangelisto hit the eight-year vesting mark.³ The previous calculations were based on having an unvested account balance.

26. Ms. Evangelisto returned the EY financial planner's call and he confirmed the information he provided in the voicemail.

27. Ms. Evangelisto asked EY financial planners, on two occasions, if her buy-in amount (and resulting out-of-pocket costs) would increase upon becoming vested. On the first occasion, during the June 24 call, the EY financial planner told her that he "did not know" and would endeavor to provide her with an answer by July 16. Unfortunately for Ms. Evangelisto, the final date to make the switch to the Pension Plan before the substantial increase⁴ was June 30.

28. Ms. Evangelisto reached out to the MyFRS Guidance Line on July 15, prior to her scheduled July 16 call. On this occasion, the EY financial planner provided incorrect information when he told her that buy-in amounts did not

³ In her Proposed Recommended Order, Ms. Evangelisto asserted that she became "vested" on July 1, 2020, after completing eight years of creditable service with FRS-participating employers.

⁴ It is important to note that the amount to buy into the Pension Plan increased every time Ms. Evangelisto requested a calculation, albeit not the sizeable jump that occurred when she became vested.

substantially increase upon vesting. This proved to be inconsequential, however, as the increase to Ms. Evangelisto's buy-in amount had occurred as of July 1, 2020, prior to the EY planner providing the incorrect information.

29. An EY financial planner provided inaccurate information to Ms. Evangelisto when he indicated that no substantial jump would occur upon vesting. Nevertheless, Ms. Evangelisto is required to pay a buy-in amount as calculated by the Division of Retirement when she chooses to move forward with making the second election.

30. Petitioner did not prove that she should be entitled to pay the buy-in amount calculated in January 2020. That amount was valid until January 31, 2020, and the document provided to Ms. Evangelisto clearly notified her of such.

31. Ms. Evangelisto still has a one-time second election to move into the Pension Plan.

CONCLUSIONS OF LAW

32. DOAH has jurisdiction over the parties and the subject matter of this cause pursuant to sections 120.569 and 120.57(1), Florida Statutes.

33. Ms. Evangelisto initiated this matter, alleging Respondent, through its contracted service provider EY, provided incorrect, inaccurate, and erroneous information to her regarding the impact of vesting on her buy-in amount, and, consequently, she should be allowed to enroll in the FRS Pension Plan using the estimated buy-in cost provided to her on January 22, 2020.

34. The burden of proof in an administrative proceeding, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue. *Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778 (Fla. 1st DCA 1981); *see also Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co.*, 670 So. 2d 932, 935 (Fla. 1996). The standard of proof is the preponderance of the evidence standard. § 120.57(1)(j), Fla. Stat.

35. Respondent is required by statute to resolve complaints against EY made by FRS employees. Section 121.4501(8)(g), Florida Statutes, provides, in relevant part:

The state board shall receive and resolve member complaints against the program, the third-party administrator, or any program vendor or provider; shall resolve any conflict between the third-party administrator and an approved provider if such conflict threatens the implementation or administration of the program or the quality of services to employees; and may resolve any other conflicts.

36. Ms. Evangelisto is currently enrolled in the Investment Plan and seeks to make a second election to transfer to the Pension Plan. Florida law authorizes such a move, but with conditions. Section 121.4501(4)(f) provides, in relevant part:

After the period during which an eligible employee had the choice to elect the pension plan or the investment plan, or the month following the receipt of the eligible employee's plan election, if sooner, the employee shall have one opportunity, at the employee's discretion, to choose to move from the pension plan to the investment plan or from the investment plan to the pension plan. Eligible employees may elect to move between plans only if they are earning service credit in an employer-employee relationship consistent with s. 121.021(17)(b), excluding leaves of absence without pay. Effective July 1, 2005, such elections are effective on the first day of the month following the receipt of the election by the third-party administrator and are not subject to the requirements regarding an employer-employee relationship or receipt of contributions for the eligible employee in the effective month, except when the election is received by the third-party administrator. (emphasis added).

37. Section 121.4501(4)(f)2. further provides that to make that second election, an employee “must transfer from his or her investment plan account, and from other employee moneys as necessary, a sum representing the present value of that employee’s accumulated benefit obligation immediately following the time of such movement, determined assuming that attained service equals the sum of service in the pension plan and service in the investment plan.”

38. Florida Administrative Code Rule 19-11.007 sets forth the general procedure for members who initially enrolled in the Investment Plan to use their second election to transfer to the Pension Plan. Subsection (3) provides that all members who wish to change their FRS retirement plan using their second election must submit a 2nd Election Form to the Plan Choice Administrator.

39. Any second election made by Ms. Evangelisto is effective the first day of the month following such election. This is consistent with the issuance of comparison estimates that provide a validity date that expires the last day of the month they are provided. For example, an estimated buy-in amount provided on July 9, 2020, expires on July 31, 2020; if a decision to move forward with a second election is provided, through the submission of the 2nd Election Form, between July 9 and July 31, 2020, the election is effective August 1, 2020. Essentially, Ms. Evangelisto had to submit her second election request on or before June 30, 2020, to lock in a buy-in amount that was not affected by her vesting.

40. SBA does not have statutory authority to allow Ms. Evangelisto to utilize her second election by paying anything other than the sum representing the present value of her accumulated benefit obligation *immediately following the time of such movement*. See § 121.4501(4)(f)2., Fla. Stat. The required payment of this buy-in amount, how the amount is calculated, and, even, *when* the amount is calculated, are all expressly set forth in statute.

41. Respondent has no authority to amend this amount or require the application of an expired amount to Petitioner's second election transfer. In discharging its responsibilities, SBA must act within the parameters established by the Legislature. SBA has only the authority conferred on it by the Legislature. *See Pesta v. Dep't of Corr.*, 63 So. 3d 788, 790 (Fla. 1st DCA 2011) (observing that administrative agencies have only such powers as statutes confer); *Schiffman v. Dep't of Prof'l Reg., Bd. of Pharm.*, 581 So. 2d 1375, 1379 (Fla. 1st DCA 1991) ("An administrative agency has only the authority that the legislature has conferred it by statute.").

42. As of the date of the hearing, Ms. Evangelisto had not submitted a request to utilize her second election and transfer to the Pension Plan. If she chooses to do so, she must pay all out-of-pocket costs that result from the buy-in amount calculated by the Division of Retirement when she submits her 2nd Election Form.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the State Board of Administration enter a final order dismissing Petitioner's Florida Retirement System Investment Plan Petition for Hearing.

DONE AND ENTERED this 21st day of January, 2021, in Tallahassee, Leon County, Florida.



JODI-ANN V. LIVINGSTONE
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

COPIES FURNISHED:

Elisha Marie Evangelisto


Deborah Stephens Minnis, Esquire
Ausley McMullen, P.A.
Post Office Box 391
Tallahassee, Florida 32302

Ash Williams, Executive Director &
Chief Investment Officer
State Board of Administration
1801 Hermitage Boulevard, Suite 100
Post Office Box 13300
Tallahassee, Florida 32317-3300

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.